out of place here. The court is called upon to construe a solemn instrument, the form of which is prescribed by the legislature, so that there is even less reason for considering public policy than where the bond is given between private individuals. It will not do to say, as was done in *State* v. *Copeland, supra,* that the bond is merely exacted to obtain the liability of the sureties, as well as that of the principal, which would regularly fall on a fiduciary. The bond is an absolute undertaking, to be void on the happening of the conditions contained in it, and the court has no more power so to construe its nature away than it has to add a condition that it shall be void so long as due care is exercised by the obligor in the discharge of his duties. The law does not concern itself with the extent of the obligation a man chooses to assume, though in imposing a duty upon him it has regard for his capacity. Durfree on Official Bonds, § 197. How strictly the courts taking this view will abide by its logical consequences remains to be seen. In *Fairchild* v. *Hedges, supra,* a disposition is shown to limit it, as was done in *United States* v. *Thomas,* 15 Wall. 537, to a liability like that of the common carrier of freight. This, however, does not seem justifiable. Durfree on Official Bonds, § 199. For the four views that have been held on this vexed question, see Mechem on Public Officers, §§ 298 *et seq.*

RECENT CASES.

BILLS AND NOTES — INDORSEE AFTER MATURITY. — The defendant made a note payable to one C. C forged an exact reproduction of this note, and indorsed the forgery after maturity to a third party, to whom it was paid by the defendant in the belief that it was the genuine note. The original note was indorsed after this payment to the plaintiff, who now brings action. *Held,* that he took the note subject to the equities against C, and could not recover. *Leach* v. *Funk,* 66 N. W. Rep. 768 (Ia.).

This case has no precedent. The court seems wrong in regarding these facts as giving rise to an equity attaching to the note and barring the plaintiff's right. The issue and collection of the forged instrument was an independent transaction, in which the defendant might well base a set-off as against C, but this is not an equity to be available against an innocent indorsee, even after maturity.

CARRIERS — SLEEPING CAR COMPANY — LIABILITY FOR BAGGAGE. — The plaintiff, a passenger in a Wagner sleeping car, on her arrival at her destination, intrusted her hand baggage to the porter to carry to the waiting-room, which was about a hundred yards from the train. A sealskin cape having been lost during this removal, *held* that the sleeping car company is a common carrier of baggage so intrusted to its care, and is therefore liable to the plaintiff for this loss. Ross, J., dissenting. *Voss* v. *Railroad,* 43 N. E. Rep. 20 (Ind.).

The decision of the majority seems clearly erroneous. The dissenting opinion takes the only tenable position on these facts; namely, that while the sleeping car company's agreement includes assistance to the passenger in alighting, beyond that point the porter cannot bind the company to any liability, much less that of a common carrier. The porter was merely the servant of the passenger.

CONSTITUTIONAL LAW — INTERPRETATION OF STATUTES — LEGISLATIVE POWERS. — An act of 1854 provided that vacancies in certain offices in Philadelphia should be filled by vote of the city councils until the next city election. *Held,* that an act of 1867, providing that the words "next city election" should be construed to mean the election at which a successor would have been elected if there had been no vacancy, was unconstitutional, as seeking to compel the courts to construe the previous act contrary to its meaning. *Commonwealth ex rel. Roney* v. *Warwick, Mayor,* 33 Atl. Rep. 373 (Pa.). See NOTES.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — KILLING GAME — SALE OUTSIDE STATE. — *Held,* that the ownership of wild game within the limits of a State,

so far as it is capable of ownership, is in the State for the benefit of all its people in common; and that it is not a violation of the Interstate Commerce clause of the Constitution for a State to prohibit the transportation, outside its limits, of game lawfully killed in the State. Field, J., and Harlan, J., dissenting. *Geer* v. *State*, 16 Sup. Ct. Rep. 600.

The opinion of the majority is based on the reasoning that, when a State gives one the right to kill game, which it undoubtedly may do, it has the power if it pleases to confer only a qualified ownership in the game, quite different from the perfect nature of ownership in other property. The decision is *contra* to *State* v. *Saunders*, 19 Kan. 127, and *Territory* v. *Evans*, 23 Pac. Rep. 115 (Idaho); but owing to the peculiar nature of property in animals *feræ naturæ*, which was overlooked in the two cases *supra*, it seems the more reasonable interpretation of the Constitution.

CONSTITUTIONAL LAW — SELF-INCRIMINATING TESTIMONY. — A federal statute provides that no person shall be excused from testifying before the Interstate Commerce Commission on the ground that his testimony may tend to criminate him; but that no person shall be prosecuted for any transaction concerning which he may testify. *Held*, four judges dissenting, that this is not in conflict with the fifth amendment to the Constitution, which provides that no person shall be compelled, in any criminal case, to be a witness against himself. *Brown* v. *Walker*, 16 Sup. Ct. Rep. 644. See NOTES.

CONSTITUTIONAL LAW — TURNPIKE ROAD — REGULATION OF RATES. — The charter of a turnpike road company provided that it should be lawful for the company to take certain fixed tolls. There was no reserved power to alter the charter. Later the legislature passed an act fixing uniform rates for all turnpikes in the State, which were less than those fixed in the company's charter. *Held*, latter act valid. Though the charter of a private corporation is a contract, and is within the protection of the clause against impairing the obligations of contracts, yet if the corporation has a public function to perform it is not protected from legislative interference unless the State has clearly indicated in the charter a purpose not to interfere. *Winchester & L. Turnpike Road Co.* v. *Croxton*, 34 S. W. Rep. 518 (Ky.).

The case is very similar to, but goes a step beyond, *Railroad Commission Cases*, 116 U. S. 307, where a grant of a power to fix charges was held not to prevent the legislature from establishing rates; power was granted only to fix reasonable charges, and the legislature is the judge of reasonableness; the legislature did not intend to surrender its power to fix rates. So, in the principal case, it is a question of the construction of the contract, whether the State meant, by granting the right to charge certain fixed rates, to barter away forever the power to provide reasonable rates. The court's treatment of the case is sound, and the case is a good illustration of the rule that rights not expressly granted by the State are reserved.

CONSTITUTIONAL LAW — VESTED RIGHTS UNDER A CHARTER. — Bill by a stockholder in the Great Northern Railway, to restrain the company from carrying out a contract of consolidation with the Northern Pacific Railway, whereby one half of the capital stock of the latter was to be transferred to stockholders of the Great Northern, and the Great Northern was to guarantee the payment of certain Northern Pacific bonds. The two lines were parallel and competing. The charter given to the Great Northern in 1856 reserved the right of amendment "in any manner not destroying or impairing the vested rights of said corporation." By an amendment in 1865, the railroad was given general power to consolidate with other roads. In 1874 the legislature forbade consolidation with parallel or competing lines; and subsequently to this act of 1874 the contract in question was entered into. *Held*, that so long as the power to consolidate remained unexecuted, it was not a vested right beyond the scope of legislative control, and thus the act of 1874 did not impair the obligation of a contract. *Pearsall* v. *Great Northern Ry. Co.*, 16 Sup. Ct. Rep. 705.

The case involves a point not covered by previous authorities. The doctrine of the court appears to be that a power in a charter to do certain things which are unnecessary to the main object of the grant, may be treated as a mere license, and revoked by the legislature so long as the power remains unexecuted. The case itself calls for nothing more than a decision that such an unexecuted power does not constitute a vested right within the meaning of the amendment clause in the original charter; however, the very next case in the reporter contains a *dictum* to the effect that, even where the charter contains no clause of reservation, the public nature of railway corporations is such as to subject them to this sort of legislative control. Under its police power, said the court in *Louisville & N. Ry. Co.* v. *Kentucky*, 16 Sup. Ct. Rep. 715, the legislature "may deal with the charter of a railway corporation so far as is necessary for the protection of the lives, health, and safety of its passengers or the public, or for the security of property, or the conservation of the public interests, provided, of course,

that no vested rights are thereby impaired"; and under the doctrine of the principal case a power to consolidate, while unexecuted, is not a vested right. The decision seems in line with the tendency to limit the scope of the *Dartmouth College Case*, and to give wider range to the so-called police power of the State legislatures.

CONTRACTS — COMPROMISE OF DOUBTFUL CLAIM. — *Held*, that a promise made in consideration of the release by the promisee of a doubtful claim against the promisor is valid, though such claim was not in fact enforceable. *Dovale* v. *Ackermann*, 37 N. Y. Supp. 959.

It has been held that the release of a doubtful claim is not sufficient consideration to support a promise, where no valid claim actually existed in favor of the promisee. *Gunning* v. *Royal*, 59 Miss. 45. Such a rule as this would apparently discourage compromise, as each case would be decided in court the same after compromise as before. A better doctrine is supported by the weight of authority, both in England and the United States. According to this modern view, the compromise of a doubtful claim is valid consideration, if the promisee honestly believed that he had a good cause of action. *Cook* v. *Wright*, 1 B. & S. 559; *Zoebisch* v. *Von Minden et al.*, 120 N. Y. 406; Pollock on Contracts, 2d Am. ed, 182, note (*é*), collecting authorities. It will be observed that the court, in deciding *Dovale* v. *Ackermann*, did not directly pass upon the question whether it was necessary that the plaintiff should have honestly believed she had a valid claim; but that she did have such belief appears quite clear upon the facts.

CONTRACTS — CONSIDERATION. — *Held*, that a note without other consideration than the giving up of what afterwards turned out to be a useless certificate of registration, is invalid for want of consideration. *McCullum* v. *Edmonds*, 19 So. Rep. 501 (Ala.).

In the absence of all fraud, and as a question of law, this decision is *contra* to the weight of authority. Whatever might have been the ruling in equity, the mere inadequacy of consideration, so long as there was some consideration, should not have been gone into by a court of law. The plaintiff was not bound to turn over the certificate, and the mere fact that it was not so valuable as the defendant expected should have no bearing on the case. *Haigh* v. *Brooks*, 10 Ad. & E. 309, cited with approval in *Wilton* v. *Eaton*, 127 Mass. 174. See also *Judy* v. *Louderman*, 29 N. E. Rep. 181 (Ohio), and *Churchill* v. *Bradley*, 5 Atl. Rep. 189 (Vt.).

CRIMINAL LAW — HOMICIDE — SELF-DEFENCE. — Where one attempted to pass over the land of another, without legal right and at all hazards, and the owner intended to prevent such trespass at all hazards, *held*, that the one attempting to pass without legal right is entitled to take the life of the other in self-defence, he himself having been guilty of no overt act in bringing on the affray. *People* v. *Conkling*, 44 Pac. Rep. 314 (Cal.).

This decision, although in accord with recent adjudications by the same court cited in the opinion, does not represent the better law. The court seems to put much stress on the generally accepted rule in *Stoffer* v. *State*, 15 Ohio St. 47, that when a person has been feloniously assailed, and the felon has desisted from his attempt and taken to flight, the right to pursue for private defence ceases as soon as, in the reasonable belief of the assailed, the danger has ceased to be immediate and impending. There is no analogy between the cases. In *Stoffer* v. *State* the original felonious attack had ceased completely. A reopening of the assault was an entirely new offence, which the deceased undertook at his own risk. But in the principal case the facts seem to be totally different. The trespass was one of a series of continuous acts, which, as was known to the defendant, would in all probability lead up to the taking of life.

CRIMINAL LAW — INTOXICATING LIQUOR — SALE BY SOCIAL CLUB. — *Held*, that the dispensing of liquors by a social club, which has a limited membership, and was organized for a legitimate purpose, to which the furnishing of liquors to its members is merely incidental, is not a sale within the meaning of the liquor law of 1892. *People* v. *Adelphi Club*, 43 N. E. Rep. 410 (N. Y.). See NOTES.

DAMAGES — CONTRACT — DUTY TO MITIGATE. — In an action for refusal to allow the completion of a contract to haul logs, it was contended that damages should be reduced by proceeds obtainable from other employment during the time necessary to have completed the contract. *Held*, that where the breach is of a contract to do a particular thing not necessarily involving personal services, there is no duty to seek to mitigate damages for the benefit of the delinquent, and if the plaintiff actually does obtain employment the amount of damages is not thereby affected. *Sullivan* v. *McMillan*, 19 So. Rep. 340 (Fla.).

The case seems to represent the American law. The distinction is taken on account of the impracticability of going into evidence of what the plaintiff might have earned

in different occupations and contracts since the breach. 1 Sedgwick on Damages, 8th ed., § 208. This distinction does not appear to be taken in England. The rule as to the general duty to mitigate damages, stated in *Frost* v. *Knight*, L. R. 7 Ex. 111, and *Roper* v. *Johnson*, L. R. 8 C. P. 167, would seem to be contrary to the principal case; as would *Roth* v. *Taysen*, 12 *The Times*, L. R. 211. But while the English law might not compel the plaintiff to seek other contracts (*Smith* v. *McGuire*, 3 H. & N. 554, at p. 567), it is quite probable that whatever could be proved to have been gained would be deducted. Mayne on Damages, 5th ed., p. 174.

DAMAGES — TRESPASS TO LAND BY WRONGFUL DEPOSIT. — The defendant, a coal company, dumped refuse on the plaintiff's land, the value of which for agricultural purposes was £200, but for the use made by the defendant about £1000. *Held*, the latter is the true measure of damages, for the defendants would otherwise be qualifying their own wrong. *Whitwham* v. *Westminster &c. Co.*, 12 *The Times* L. R. 318.

The case is plainly right by the quasi-contractual principle on which it is based, but it is submitted that it may also be supported on the ordinary rule of compensation. The value of the land must be assessed with reference to all the circumstances, among which its availability for disposing of this refuse is one. A leading case on this element of value is *Boom Co.* v. *Patterson*, 98 U. S. 403.

EVIDENCE — ADMISSIONS. — Defendant was indicted for perjury in having falsely sworn that one Chandler did not commit a certain assault. To prove that Chandler did in fact commit the assault in question, a witness was permitted to testify that Chandler had admitted that he had made the assault. *Held*, that it was error to admit this testimony. *Reavis* v. *State*, 44 Pac. Rep. 62 (Wyoming).

The testimony admitted was mere hearsay. As the admission of Chandler, it could have been used against him. But the admission was not that of defendant nor of one identified in interest with him, and therefore it could not be used as an admission against defendant. A common interest for or against the existence or non-existence of a particular fact is not an identity of interest in the technical sense of that word. Thus in divorce proceedings the admissions of the defendant that she has committed adultery with the co-respondent, can be used against her, but not against the co-respondent. *Robinson* v. *Robinson*, 1 Sw. & Tr. 362. There is a seeming absurdity in admitting or excluding certain testimony according as one or another person's interest will be affected by proof of the fact admitted. The explanation of this logical absurdity seems to be that, on grounds of public policy, one is not heard to say that the jury may not take into consideration what he apparently thought was the truth in regard to a material point in the case, even though what he was heard to say could not be used to establish against another that the fact asserted was true. 1 Greenleaf on Evidence, §§ 169–171. *Moriarty* v. *Railway Co.*, L. R. 5 Q. B. 314.

EVIDENCE — FRAUD — RES INTER ALIOS ACTA. — A made certain false representations to an insurance company, in applying for a policy. The question was whether these misstatements were fraudulent or innocent. *Held*, that the fact that declarations equally untrue in similar respects were made by the same person to two other insurance companies was admissible evidence. *Penn Mutual Life Ins. Co.* v. *Mechanics' Bank & Trust Co.*, 72 Fed. Rep. 413.

The case is an illustration of a well recognized exception to the rule of evidence which excludes collateral matters from consideration. The facts here pointed to a regular scheme to defraud. In these circumstances, to determine whether one misrepresentation is by accident or by design, others are received to show that such misrepresentation was intentional. Stephen's Digest of Evidence, arts. 11 and 12. One recent case indicates an inclination to reject this sort of evidence. *Commonwealth* v. *Jackson*, 132 Mass. 16. But the authorities generally favor it. Greenleaf on Evidence, § 53, note *b*. These collateral events must usually be closely connected in point of time with the main transaction. But that a good deal of latitude in this particular may sometimes be allowed is shown by the extreme case of *Mining Co.* v. *Watrous*, 61 Fed. Rep. 163, in which the occurrences were separated by a period of two years. Earl, J., in *People* v. *Shulman*, 80 N. Y. 373, note, and Lindley, in *Blake* v. *Albion Life Assurance Co.*, 4 C. P. D. 94, 106, clearly state what is essential for the reception of evidence of this nature, viz. that such a connection between the acts be established that it is a reasonable inference that they proceed from the same motive.

EVIDENCE — HEARSAY. — In an action against the defendants, as executors of the deceased maker of a promissory note, declarations of the deceased were offered in evidence, in which he had stated that the debt for which this note was given had been paid. *Held*, this evidence was admissible. *Moore* v. *Palmer et al.*, 44 Pac. Rep. 142 (Wash.).

Dunbar, J., dissented from this decision, and his dissent seems clearly justified. The evidence offered was pure hearsay, coming within none of the recognized ex-

ceptions to the general rule of exclusion. It was a declaration in the deceased party's interest, and should have been rejected. *Reese* v. *Murnan*, 5 Wash. 373.

EVIDENCE — NEGLIGENCE — "STOP, LOOK, AND LISTEN" RULE. — *Held*, negligence is a question of fact, depending upon the circumstances, and it is not negligence *per se* for one about to cross the tracks of a street railway to omit to look in both directions for the approach of a car. *Cincinnati St. Ry. Co.* v. *Snell*, 43 N. E. Rep. 207 (Ohio).

While recognizing the rule, apparently well established in Ohio, that one who crosses the tracks of a steam railroad, must, in the absence of a reasonable excuse, look and listen, in order to avoid the imputation of negligence, the majority of the court refuse to extend it to cases of electric street cars. Even in the case of a steam railroad the better view would seem to be that failure to look and listen is properly only *prima facie* evidence of negligence, and the defendant is entitled to have the extenuating circumstances weighed by the jury. *Stackus* v. *Railroad*, 79 N. Y. 464. *A fortiori*, in the case of the street railway where the company does not own the tracks, and where less agility should be required to avoid the cars when discovered, the hard and fast rule is inappropriate.

INSURANCE — ARSON BY AGENT OF ASSURED. — Where evidence showed that the agent of the assured, having entire management of the business, had caused the destruction of the property by fire, *held*, that as no evidence connected the assured with the arson, the loss was within the perils against which the policy insured. *Feibelman* v. *Manchester Fire Assurance Co.*, 19 So. Rep. 540 (Ala.).

The case is regarded as law, though apparently decided but once before. *Henderson* v. *Ins. Co.*, 10 Rob. (La.) 164; 1 Biddle on Insurance, § 442. It is interesting, however, to note that the act of the agent is the same in the principal case as that which constitutes barratry in marine insurance. And while it was always the custom to specify in marine policies that barratry was insured against, — see 2 Phillips on Mar. Ins., §§ 9, 1065, — it was eventually decided that in the absence of such a stipulation barratry was not included among the perils covered by the policy; *Waters* v. *Merchants' Ins. Co.*, 11 Peters, 213; and the wilful misconduct of servants causing loss of goods upon land has been considered barratry in one case under a marine policy. *Boehm* v. *Combe*, 2 Maule & Sel. 172. So the law of the two branches of insurance is in apparent conflict.

INSURANCE — INSURABLE INTEREST IN ASSIGNEE OF LIFE POLICY. — *Held*, that a policy of life insurance issued to a person insured is a proper subject of sale and transfer, and is enforceable in the hands of an assignee, though he had no insurable interest in the life of the payee. *Steinback* v. *Diepenbrock et al.*, 37 N. Y. Supp. 279.

It appears to be fairly well settled that, on grounds of public policy, no one can take out a policy of insurance on a life in which he has no insurable interest. Greenhood on Public Policy, 279; *Ruse* v. *Insurance Co.*, 23 N. Y. 516. There has been considerable judicial conflict, however, on the question whether, after the policy is once issued, it may be assigned to one without insurable interest. The law in New York is pretty clearly in accord with the principal case. *Olmstead* v. *Keyes*, 85 N. Y. 593. This view has been adopted by other American jurisdictions, and is apparently followed in England. See *Clark* v. *Allen*, 11 R. I. 439; *Ashley* v. *Ashley*, 3 Sim. 149. On the other hand, the United States Supreme Court and various State jurisdictions require an insurable interest in the assignee. *Cammack* v. *Lewis*, 15 Wall. 643; *Warnock* v. *Davis*, 104 U. S. 775; *Franklin Insurance Co.* v. *Hazzard*, 41 Ind. 116; *Gilbert* v. *Moose*, 104 Pa. St. 74; *Loomis, Adm'r*, v. *Life Ins. Co.*, 6 Gray, 396; Greenhood on Public Policy, 288. But see May on Insurance, 3d ed., pp. 832, 880.

PERSONS — DIVORCE — EFFECT OF SUBSTITUTED SERVICE ON A DECREE AS TO CUSTODY OF CHILDREN. — During proceedings for divorce, the husband, with his two infant children, was absent in a foreign country. Constructive notice had been served on him by publication, and at the trial it appeared that he had simply left the State to avoid the proceedings, and meant to return when the matter was closed. *Held*, by four judges to three, that no decree could be made against the husband as to the custody of the children. *De la Montanya* v. *De la Montanya*, 44 Pac. Rep. 345 (Cal.).

As to one point, the majority of the court were clearly right; namely, that a personal judgment on constructive service against a non-resident is void, even in the State where it is made. The law has shaped itself into this proposition since the case of *Pennoyer* v. *Neff*, 95 U. S. 714. The doubtful point in the case seems to be whether a decree as to custody of children may not be made against the husband, when the children have been taken out of the State simply to avoid the divorce proceedings. Leaving aside the question, however, on which the majority and minority differed in this case, as to whether custody of children is a status to be passed on like marriage, it

would seem that, unless the court has the children before it, it has no right to make a decree; for it is the children's interests which must be primarily considered, and this can only be done when the infants are present and adequately represented. See note to *Flint River Steamboat Co.* v. *Foster*, 48 Am. Dec. 273, and Cooley on Constitutional Limitations, 6th ed., p. 499.

PERSONS — MARRIED WOMEN — DEDICATION BY ESTOPPEL. — In consequence of an agreement with the respondent, a married woman, that she would dedicate part of her land to the public, the complainant, an adjoining proprietor, erected a building on the site of the proposed street. By a statute, a married woman could not convey without joining her husband. *Held*, that a dedication could not be established against the respondent by an estoppel *in pais*. Such dedication must be accomplished by conforming to the statutory requirements, or by a proper conveyance in which her husband is joined. *Vansandt* v. *Weir*, 19 So. Rep. 424 (Ala.).

This case is undoubtedly correct (*Todd* v. *Pittsburgh, Fort Wayne & Chicago R. R.*, 19 Ohio St. 514); but there being no misrepresentations, it is hard to see how any question of estoppel arose. Generally speaking, however, where there is no question of tort, a married woman cannot be deprived by estoppel of that which she cannot deprive herself of by her own free will. 2 Bishop on Married Women, Chapter XXXVI.

In Angell on Highways, 3d ed., Chap. III., § 156, the view that there may be dedication by estoppel *in pais* is repudiated, and it would seem with justice. Because a man is estopped by his acts or representations from denying the existence of a way as to three or four persons, it does not follow that he has dedicated this way to the public as a street.

PERSONS — MARRIED WOMEN — POWER TO BIND SEPARATE ESTATE. — A married woman mortgaged her land as security for a loan to her husband. She made no representations at the time of the mortgage that the loan had any connection with her separate estate, and the mortgagee knew in fact that the loan was for the husband's sole benefit. A statute gave the married woman the right "to contract and be contracted with as to her separate property in the same manner as if she were unmarried." *Held*, this mortgage was unenforceable, because not connected in any way with the married woman's separate estate. If she had represented that it was such a contract, she would have been estopped from setting up her incapacity. *American Mortgage Co.* v. *Owens*, 72 Fed. Rep. 219.

Statutes in terms like the one in this case are common, and the result here reached is in accord with authority generally.

PROPERTY — ADVERSE POSSESSION. — The plaintiff had a remainder in fee in certain land, one Brown being her guardian. This same Brown was the life tenant on whose estate the remainder was expectant. In his capacity of guardian, apparently in ignorance of his own life estate, he attempted to convey by deed a present fee to a third party, which deed now turns out to be void for non-compliance with requisite formalities. The grantee under this deed took possession, and by several mesne conveyances the land came into possession of the defendant, who has occupied it for the period required by statute to bar actions. Brown, the life tenant, died, whereupon the plaintiff brought this ejectment. *Held*, that, notwithstanding the outstanding life estate, the statute had run against the plaintiff. *Nelson* v. *Davidson*, 43 N. E. Rep. 361 (Ill.).

The court lays some stress on the fact that the deed which gave color to the defendant's adverse possession purported to convey the plaintiff's estate, but nothing would seem to turn on that. If Brown cannot be considered a party to the disseisin, no cause of action accrued to the plaintiff and she cannot be barred. If the other view is taken, and the plaintiff's estate is being infringed upon, then this decision is a distinct rejection of the doctrine of disseisin by election laid down in *Taylor d. Atkyns* v. *Horde*, 1 Burr. 60, and followed by the later decisions; 4 Kent's Commentaries, §§ 482 *et seq.*

PROPERTY — LANDLORD AND TENANT — SURRENDER BY OPERATION OF LAW. — *Held*, that, where the lessee of a wharf abandoned it, the collection of wharfage by the lessor from a shipper who occasionally used the wharf during the remainder of the term did not operate as a surrender, as such user was not procured by the lessor. *Aberdeen Coal & Mining Co.* v. *City of Evansville*, 43 N. E. Rep. 316 (Ind.).

The court does not dispute the existence of a surrender where the lessor creates a new tenancy after abandonment by the lessee. *Thomas* v. *Cook*, 2 B. & Ald. 119, is cited with approval. But, it is said, the collection of wharfage from one who uses the wharf at his own instance merely, does not operate to discharge the lessee from liability to pay rent. It is to be noticed that the doctrine of *Auer* v. *Penn*, 99 Pa. St. 370, (in which case the landlord re-rented the abandoned premises, to mitigate the lessee's damages, and

notified the lessee that he was not thereby discharged from liability,) was not invoked. And it would seem that the collection of wharfage by the lessor, after the abandonment, apparently on its own account, was as inconsistent with its recognition of the continuance of the lessee's term as the creation of a new tenancy would have been. The correctness of the decision, which depends upon the validity of this distinction, seems at least doubtful.

PROPERTY — MORTGAGES — MERGER — BONA FIDE PURCHASER. — A mortgagee acquired the title to the mortgaged property, and, in the deed by which it was conveyed to him, it was stated that the title was passed "subject to a mortgage of three hundred dollars, which grantee hereby assumes and agrees to pay." *Held*, that it was evident from this that the intention was to continue the existence of the mortgage lien, and no merger ensued; and that exhibiting the unrecorded deed to intending purchasers of the property, combined with the fact that the records disclosed the encumbrance, constituted sufficient notice to such parties of the intention indicated by the clause in the deed. *Mathews et al.* v. *Jones*, 66 N. W. Rep. 622 (Neb.).

This case is apparently very near the line, but may be supported. It is a general rule of law that a merger takes place when a greater and a lesser estate meet in the same party; but in equity, whenever the legal title becomes united with the equity of redemption, there will be no merger, if such is the intention of the parties. Even, however, where there is an expressed intention, especially if it be vague or doubtful, the courts will presume the intention to be in accordance with the real interest of the parties, and will rule accordingly. Jones on Mortgages, §§ 848, 856, 870, 873; per Sir William Grant, in *Forbes* v. *Moffatt*, 18 Ves. 384. The clause "subject to a mortgage," etc., in the deed, seems to indicate the intention of the parties in the principal case that the titles should be kept separate; and the fact that in Nebraska, as in most of the States, a mortgage is regarded as a lien, and not as an estate in fee, does not apparently affect the rule as to merger. The court would seem to be right too, in holding that the plaintiffs, in obtaining the title to the land, were not *bona fide* purchasers. They certainly had such notice as required them to make further inquiry in regard to the whereabouts of the mortgage and notes, and should have required the mortgagee to produce them before purchasing. Jones on Mortgages, § 872. See also *Purdy* v. *Huntington*, 42 N. Y. 334.

PROPERTY — MORTGAGE — STATUTE OF LIMITATIONS — EFFECT OF REMOVAL. — A executes to B a promissory note secured by mortgage. A then sells the mortgaged property to C. After the statute has run on the note, A renews to B his promise to pay. Later C sells to D. *Held*, the original mortgagor cannot by his second promise affect the rights of D. The latter takes clear of encumbrance. *Cook* v. *Prindle*, 66 N. W. Rep. 781 (Ia.).

Assuming, as the court does, that when a debt is barred by the statute the mortgage is thereby discharged, the decision seems sound. But this view of a mortgage is quite exceptional. A few of the Western States have adopted it, sometimes owing to the peculiar language of the Statute of Limitations, as in Iowa, and sometimes owing to their conception of the nature of a mortgage, which, they hold, does not convey an estate, but simply creates a lien. Regarded in this light, the mortgage becomes a mere incident to the debt, and when the remedy on the debt is taken away, the mortgage also disappears. Jones on Mortgages, 5th ed., §§ 1203, 1204, 1207, discusses the question fully, collecting the authorities and giving the jurisdictions in which the Iowa rule prevails.

PUBLIC OFFICERS — TREASURER'S LIABILITY ON HIS BOND. — *Held*, that a county treasurer is liable for money lost by reason of the failure of the bank in which it was deposited, though due care was used in its selection. *Fairchild* v. *Hedges*, 44 Pac. Rep. 125 (Wash.). *Contra*, that there is no liability in such a case without negligence. *State* v. *Copeland*, 34 S. W. Rep. 427 (Tenn.). See NOTES.

QUASI-CONTRACTS — MONEY PAID ON JUDGMENT SUBSEQUENTLY REVERSED. — *Held*, that money voluntarily paid to satisfy a judgment which was subsequently reversed cannot be recovered back, where it appears that the original claim was just, and that the judgment was reversed for a mistake in procedure. *Teasdale* v. *Stoller*, 34 S. W. Rep. 873 (Mo.).

The case illustrates the equitable nature of this form of action. It is settled that ordinarily one can recover money he has been forced, by levy of execution, to pay on a judgment which is subsequently reversed. *Clark* v. *Pinney*, 6 Conn. 297; Keener on Quasi-Contracts, 417–419. So when the money has been voluntarily paid. *Lott* v. *Sweezey*, 29 Barb. 87; *Scholey* v. *Halsey*, 72 N. Y. 578; but see, *contra*, *Gould* v. *McFall*, 118 Pa. St. 455. The right of recovery is based on the fact that it is against conscience for the defendant to retain the money. Hence, where, as in the principal case, it ap-

pears that it is clearly not unconscientious for him to retain it, there should be no recovery.

STATUTE OF LIMITATIONS — ORAL PROMISE TO WAIVE. — An enactment provides that, to take a debt out of the Statute of Limitations, an acknowledgment of indebtedness or promise to pay must be in writing. A debtor, being pressed for payment, agrees orally with his creditor, just before the debt is outlawed, that he will waive the defence of the statutory bar in consideration of the latter's forbearance to sue for a certain time. The creditor does forbear for the time requested, and afterwards brings suit. *Held*, the debtor cannot set up the Statute of Limitations as a defence. *Bridges* v. *Stephens*, 34 S. W. Rep. 555 (Mo.).

Express statutes, similar to the above, requiring written evidence of a new promise to pay by a debtor in order to bind him, have been adopted in many of the States. Such provisions might at first seem to cover the facts of the present case, and to render the oral agreement invalid. But a distinction is to be made between two different kinds of promise. First, there are those which have nothing but the past consideration of an old debt to support them. It was at these that the statute requiring writing was evidently aimed. Promises of the other class have a new and valid consideration, and therefore form part of a complete contract. This was the case in *Bridges* v. *Stephens*. The consideration was the forbearance of the creditor, and there was in all respects a perfect second contract, which might have been declared on in a separate action. *East India Co.* v. *Paul*, 7 Moo. P. C. C. 85, 112. It was not for such an agreement that the statute was intended, but only for a bare promise. This seems to be the true *ratio decidendi* in the case. The theory of estoppel put forward by the court is hardly tenable, for there was no misrepresentation by the debtor as to an existing fact, but simply a promise for the future.

TORTS — DECEIT — LIABILITY FOR MISREPRESENTATIONS IN PROSPECTUS. — Where a person has issued the prospectus of a company containing a representation known at the time to be false, and subsequently causes to be published a false representation to the same effect as that of the prospectus, with the intent of inducing persons to purchase shares of the company in the open market. *Held*, he is responsible for the consequences of so doing to any one who, having received a prospectus, purchases shares after allotment on the faith of false representations so published. *Andrews* v. *Mockford*, [1896], 1 Q. B. 372.

This decision correctly distinguishes *Peek* v. *Gurney*, L. R. 6 H. L. 377, where it was held that the function of the prospectus in that particular case was exhausted with the allotment. The mailing of the prospectus and subsequent publishing of false information are treated as one continuous fraud. See *Barry* v. *Croskey*, 2 J. & H. 1.

TORTS — LIBEL — PRIVILEGED OCCASION — STATUTE OF LIMITATIONS. — *Held*, that in an action for libel based on matter in the pleadings of a former suit, brought by the defendant in the libel suit against the plaintiff, the Statute of Limitations did not begin to run until the determination of the former suit in favor of the defendant therein, since otherwise two courts at once might be trying the same issues of fact. Pardee, J., dissenting. *Masterson* v. *Brown*, 72 Fed. Rep. 136.

This is a most surprising case. In the first place, it runs counter to a rule well settled in the law of libel, that words used in judicial proceedings, relevant to the issue, are absolutely privileged. Odgers, Slander and Libel, 187, 191; *Torrey* v. *Field*, 10 Vt. 353, 414; *Lawson* v. *Hicks*, 38 Ala. 279. The court's decision on this point is based on *White* v. *Nichols*, 3 How. 266, but an examination of that case will show that the remarks relied on are *dicta*, the case having arisen on libellous matter in a petition to the President for the removal of an official. Such an occasion is no doubt one of qualified privilege. Odgers, Slander and Libel, 226. In the second place, whether or not express malice is a good reply to a plea of the privilege of judicial proceedings, the cause of action is certainly complete at the publication. It is submitted, therefore, that, although a postponement of the libel suit may be desirable, it is at least an inartistic way of effecting it, to say that the cause of action does not accrue until the earlier case comes to judgment.

TRUSTS — PURCHASER FOR VALUE — PRE-EXISTING DEBT. — One Price, having a claim against *The Elmbank* for salvage, made a partial assignment of his claim to the extent of $1,500 to Cofran, and later another partial assignment of the claim to the amount of $3,200 to Newman. The assignment to Newman was to secure a pre-existing debt; no agreement was made that the assignment was taken as conditional payment, or that the debtor should be given time. The salvage having been paid into court, Newman, the second assignee, was the first to give notice to the holder of the fund. The fund was not sufficient to pay both Newman and Cofran in full. *Held*, that

Newman was not a purchaser for value, and therefore his prior notice to the holder of the fund did not entitle him to priority. *The Elmbank*, 72 Fed. Rep. 610.

It seems clear on principle that a creditor who takes a thing merely as security for a pre-existing debt gives no value and surrenders no right against his debtor in exchange for the new security given, and therefore that he is not a purchaser for value. Thus, one who takes personal property as security for a pre-existing debt, takes it subject to equities attached to it in the hands of the debtor. *Goodwin* v. *Massachusetts Loan Co.*, 152 Mass. 189, 199; *Savings Bank* v. *Bates*, 120 U. S. 556. It is true that, by the prevalent view, one who takes negotiable paper as security for a pre-existing debt takes it free of all equities; *Railroad Co.* v. *Bank*, 102 U. S. 14; but it seems clear that the cases taking this view must be supported, not on the ground that the holder is a purchaser for value, but on the ground that he has taken negotiable paper — a thing which in many respects is treated as money — in the course of a business transaction, and that he may therefore hold it free of all equities.

REVIEWS.

SELECT CASES FROM THE CORONERS' ROLLS, A. D. 1265–1413, with a Brief Account of the History of the Office of Coroner. Edited for the Selden Society, by Charles Gross, Ph.D., Assistant Professor of History, Harvard University. London, 1896.

The greatest importance of these rolls is historical and chiefly constitutional; and Professor Gross has done well in confining himself, in his excellent and scholarly introduction, to the constitutional position of the coroner, as shown by these rolls and other early authorities. There seems to have been no very close parallel elsewhere to this officer. The English coroner is a curious link between Crown and people. Elected by the people of the county or other local division, the only elective official in the county courts, coming in every case of accidental death and in many others into close relations with the people, he was essentially a popular officer, a product and a proof of local self-government; on the other hand, he was the direct means of accounting to the central government for affairs of every-day life in which it was interested, especially by overseeing the operation of the hue and cry, and by securing for the Crown its deodands and similar rights; and was a check for the King upon the sheriff, though the latter was appointed by the King. No other European nation combined a strong central power with local self-government; and it is therefore not surprising that such an officer was nowhere else found.

Professor Gross brings out clearly this peculiar position of the coroner; he speaks well also of the "four neighboring vills," which seem to have persisted until lately, if indeed they do not still form an administrative group. The Introduction is in fact a valuable essay in English constitutional history.

These rolls have in large measure a quality peculiar to all the English legal rolls; they are a remarkable witness of the common life of the English people in the Middle Ages. No other nation possesses such material for the history of its people. One cannot but be surprised, in reading these rolls, at the number of small children who fell into ditches or wells, or pots of boiling water, or were buried by falling sand-banks; and one may well marvel to find that a three-year old boy "fell into a pan full of milk, and thus was drowned by misadventure" (p. 50). The state of the prisons is vividly set forth in a series of presentments in the cases of seven men who were found to have died in the prison of the castle